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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Marlyn Nutraceuticals, Inc.,) No. CV-08-1798-PHX-MHM
10 Plaintiff,) **ORDER**
11 vs.)
12)
13 Improvita Health Products, et al.,)
14 Defendant.)
15

16 Currently before the Court are Defendants Thomas Klamet and Daniel Kohler's Motion
17 For Judgement on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil
18 Procedure. In the same motion, these Defendants also request that the Court dismiss
19 Plaintiff's claims for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal
20 Rules of Civil Procedure. After reviewing the pleadings and determining that oral argument
21 is unnecessary, the Court issues the following order.

22 **I. BACKGROUND:**

23 On May 15, 2007, Plaintiff MNI and Defendant Improvita entered into a
24 Manufacturing and Supply Agreement (the "Agreement") pursuant to which MNI would
25 manufacture and supply nutritional products and supplements to Improvita. (Dkt. #1, ¶10).
26 The Agreement provides that all disputes must be resolved through an arbitration process
27 pursuant to Article XVIII, entitled "Dispute Resolution." (Dkt. #11, Ex. B). The
28 Agreement provides that Improvita will pay MNI for all finished product or work in

1 process, and all unused ingredients that can not be returned. (Dkt. #11, ¶11). Improvita
2 fell behind on payments; from approximately October 2007 through late February 2008,
3 MNI attempted to work with Improvita with respect to its delinquent debts. (Id., ¶14). On
4 February 29, 2008, due to Improvita's failure to pay down its debts and alleged attempt to
5 delay resolving the payment issues, MNI initiated negotiation proceedings pursuant to the
6 Agreement's notice provision in Article XVIII. (Id., ¶19). MNI's February 29, 2008
7 notice demanded that Improvita agree to formally mediate the payment dispute on or
8 before the close of business on March 5, 2008. (Id., ¶21). MNI also provided names of
9 potential mediators in Phoenix, Arizona, and approximately eight possible dates on which
10 the parties could mediate. (Id.). Improvita failed to respond to MNI's request until March
11 4, 2008. (Id., ¶20, Ex. C).

12 Having made no progress through alternative dispute resolution, MNI filed a
13 Complaint against Improvita in Maricopa County Superior Court on March 20, 2008.
14 (Dkt. #11, ¶23). Improvita subsequently filed a Motion to Dismiss, arguing that the
15 dispute must be resolved through mediation or arbitration based on the alternative dispute
16 resolution provision in the May 15, 2007 Agreement. (Id.). MNI did not file a responsive
17 memorandum to Defendants' Motion to Dismiss, and the Superior Court dismissed the
18 case. (Id., ¶24).

19 On May 19, 2008, MNI and Improvita submitted to a mediation in Phoenix,
20 Arizona. (Dkt. #11, ¶24). In preparation for the mediation, MNI submitted a 13 page
21 Mediation Memorandum, including 25 exhibits; Improvita made no settlement offers and
22 raised its alleged defenses less than one week prior to the mediation. (Id., ¶25). Improvita
23 did not provide supporting documentation. (Id., ¶28). Although the mediation was
24 unsuccessful, the parties attempted to schedule an arbitration. (Id., ¶25). Based on
25 correspondence between the parties' counsel, an arbitration was scheduled for August 19,
26 2008, before Steve Scott in Phoenix, Arizona. (Id., ¶26). However, one week after
27 arbitration was scheduled, Improvita informed MNI that due to a scheduling conflict, the
28 arbitration could not take place before August 26, 2008. (Id., ¶27). The parties

1 rescheduled the arbitration for August 27, 2008, to take place before Daniel Nastro. (Id.,
2 ¶29). The parties also agreed on a disclosure statement date for discovery and relevant
3 arbitration issues; Improvita confirmed the August 27, 2008 arbitration date in a letter
4 dated July 1, 2008. (Id.). But on August 14, 2008, Improvita announced that it would not
5 participate in the scheduled arbitration because of the “associated expenses”; it proceeded
6 to cancel the arbitration and offered to reschedule one after October 1, 2008. (Id., ¶30).
7 Instead, on October 1, 2008, MNI filed a Complaint against Improvita and Defendants
8 Klamet and Kohler in this Court for breach of contract, viewing Improvita’s cancellation
9 of the arbitration as an act of bad faith and an attempt to further delay resolution. (Dkt.
10 #1). Defendants filed a Motion to Dismiss on October 6, 2008, and request dismissal
11 pursuant to Federal Rules of Civil Procedure 12(b)(1)(2)(3) and (6). (Dkt. #7). On
12 November 24, 2008, the Court granted the Defendants’ Motion to Dismiss without
13 prejudice and ordered the Parties to submit to arbitration no later than December 23,
14 2008. (Dkt. #16). The Court further ordered that if the arbitration did not occur within
15 the specified time, it would permit the Plaintiff to file a motion to re-open the case. (Id.).

16 On December 02, 2008, Improvita filed a Motion to Continue Arbitration. (Dkt.
17 #18). The Court denied the Defendants’ motion, ordering the parties to meet and confer
18 to select an arbitrator no later than December 12, 2008. (Dkt. # 20). On January 27,
19 2009, MNI filed a Motion to Re-Open the Case, alleging that Defendants refused to
20 arbitrate the dispute by the court-ordered date, (Dkt. #21), along with its First Amended
21 Complaint. (Dkt. #22). In response, on February 13, 2009, Defendants filed the
22 following with the Court: Response to Plaintiff’s Motion to Re-Open the Case, (Dkt.
23 #23), Separate Answer to Amended Complaint by Improvita Health Products, Inc., (Dkt.
24 #24), Separate Answer to Amended Complaint by Thomas Klamet, Daniel Kohler, (Dkt.
25 #25), Motion For Judgement on the Pleadings pursuant to Rule 12(c) of the Federal Rules
26 of Civil Procedure. (Dkt. #26). The Court granted the MNI’s Motion to Re-Open on
27 February 17, 2009.

1 In the instant motion before the Court—Defendant’s Motion For Judgement on the
2 Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure— Individual
3 Defendants Klamet and Kohler contend that judgement on the pleadings is appropriate
4 because their status as corporate officers shields them from personal liability with regards
5 to Plaintiff’s claims. (Id.). Additionally, these Defendants argue that the Court may not
6 exercise jurisdiction over them. (Id.). Plaintiff, on the other hand, counters that its
7 pleadings properly allege actionable claims and make a *prima facie* showing of personal
8 jurisdiction over Defendants Klamet and Kohler. (Dkt. #28).

9 **II: DEFENDANTS’ MOTION FOR JUDGEMENT ON THE PLEADINGS:**

10 **A. Standard:**

11 Rule 12(c) of the Federal Rules of Civil Procedure provide that "[a]fter the
12 pleadings are closed but within such time as not to delay the trial, any party may move for
13 judgment on the pleadings. "Judgment on the pleadings is proper, when, taking all of the
14 allegations in the pleadings as true, the moving party is entitled to judgment as a matter of
15 law." Honey v. Distelrath, 195 F.3d 531, 532–33 (9th Cir. 1999). “[A] court may dismiss
16 a complaint only if it is clear that no relief could be granted under any set of facts that
17 could be proved consistent with the allegation.” Swierkiewicz v. Sorema N.A., 534 U.S.
18 506, 514 (2002) (internal quotation marks omitted).

19 **B. Discussion:**

20 In its Amended Complaint, Plaintiff plead two separate tort claims against these
21 Defendants: fraud and negligent misrepresentation. As to both claims, Defendants
22 Klamet and Kohler argue that as corporate representatives of Improvita, they cannot be
23 held personally liable to Plaintiff absent a piercing of the corporate veil based on “alter-
24 ego” theory. (Dkt. #26, p.4). Accordingly, Defendants contend that Plaintiff’s claims
25 must fail as a matter of law because its pleadings do not state facts sufficient to warrant a
26 piercing of the corporate veil. Id. Plaintiff, on the other hand, denies that piercing the
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1 corporate veil is necessary in this case. (Dkt. # 28, p.3). Instead, it argue that corporate
2 officers may be held personally liable for torts committed in their official capacity
3 without piercing the corporate veil, and, as a result, its pleadings have sufficiently stated a
4 claim. Id.

5 As a general matter, under Arizona law, “[t]he corporate fiction will be
6 disregarded when the corporation is the alter ego of the business conduit of a person, and
7 when to observe the corporation would work an injustice. The alter-ego status is said to
8 exist when there is such unity of interest and ownership that the separate personalities of
9 the corporation and owners cease to exist.” Dietel v. Day, 492 P.2d 455, 457 (Ariz. App.
10 1972). When determining the presence of alter-ego status, courts must consider, among
11 other factors, the corporation’s failure to “maintain the formalities of separate corporate
12 existence; . . . plaintiff’s lack of knowledge of separate corporate existence; and [the]
13 commingling of personal and corporate funds.” Deutsche Credit Corp. v. Case Power &
14 Equipment Co., 876 P.2d 1190, 1196 (Ariz. App.1994). This Court aggress with
15 Defendants; Plaintiff’s complaint does not contain facts that justify a piercing of the
16 corporate veil. This omission, however, is not necessarily fatal to its claims.

17 “[C]orporate directors are not personally liable for torts committed by the
18 corporation or by one of its officers merely by virtue of the office they hold.”
19 Bischofshausen, Vasbinder, and Luckie v. D.W. Jaquays Min. and Equipment Contractors
20 Co., 145 Ariz. 204, 211 (App. 1985). “[T]heir status,” however, “does not shield them
21 from personal liability.” Albers v. Edelson Technology Partners L.P., 201 Ariz. 47, 52
22 (App. 2001). Under Arizona law, corporate officers, managers, or directors may be held
23 personally liable for a corporation’s torts where they have “participated [in the tort] or
24 have knowledge amounting to acquiescence or be guilty of negligence in the management
25 or supervision of the corporate affairs causing or contributing to the injury.”
26 Bischofshausen, 145 Ariz. at 210; see Dawson v. Withycombe, 216 Ariz. 84, 101 (App.
27 2007) (“a director cannot be liable without some kind of personal participation in the tort
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1 or at least acquiescence by knowledge of the tort combined with a failure to act.”).

2 Furthermore, such liability is not contingent upon the defendant having acted individually

3 or in furtherance of personal interests: “a director or officer of a corporation is

4 individually liable for fraudulent acts or false representations of his own . . . even though

5 his action in such respect may be in furtherance of the corporate business.” Albers, 201

6 Ariz. at 52 (quoting 18B AM..JUR. 2D CORPORATIONS § 1882 (1985)).

7 Based on the preceding analysis, it is clear that the corporate veil need not be

8 pierced when the assertion of an officer or board members’ personal liability is based on

9 an allegation of tortious conduct. The instant case is such a situation; Plaintiff has plead

10 that the Defendants personally participated in two torts—fraud and negligent

11 misrepresentation. Accordingly, this Court cannot find that Plaintiff’s claims must fail as

12 a matter of law simply because Plaintiff did not allege facts sufficient to pierce the

13 corporate veil. The more difficult question for this Court, however, concerns an

14 ambiguity in Arizona law: do unintentional torts—negligence—subject an officer or board

15 member to personal liability. The Court must address this issue, as under Arizona law,

16 “[a] claim for relief for negligent misrepresentation is one governed by the principles of

17 the law of negligence.” Pettay v. Insurance Marketing Services, Inc., 156 Ariz. 365, 368

18 (App. 1987) (quoting Van Buren v. Pima Community College District Board, 113 Ariz.

19 85, 87 (1976)).

20 In Albers the Arizona Court of Appeals limited personal liability to “intentionally

21 harmful or fraudulent conduct.” Albers, 201 Ariz. at 52. This language strongly suggests

22 that only intentional torts are actionable. On the other hand, the bulk of the authority

23 speaks of torts generally, not specifically limiting a cause of action to intentional conduct.

24 See, e.g., Bischofshausen, 145 Ariz. at 210 (speaking of torts in general terms); Dawson

25 v. Withycombe, 216 Ariz. 84, 101 (App. 2007) (same). Further muddying the waters, the

26 Albers court cited with approval language from American Jurisprudence Second of

27 Corporations stating that “a director or officer of a corporation is individually liable for

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1 fraudulent acts or *false representations* of his own.” Albers, 201 Ariz. at 52 (quoting 18B
2 AM. JUR.2D CORPORATIONS § 1882 (1985)). False representations, as distinguished from
3 fraudulent acts, are not necessarily the product of intentional conduct. Given the confusion
4 on this issue, this Court will err on the side of inclusiveness, finding that claims grounded
5 in negligence are actionable under Arizona law.

6 Having decided that both of Plaintiff’s claims are potentially actionable, this Court
7 wishes to note that in their Motion For Judgement on the Pleadings, Defendants, with the
8 exception of alter-ego theory—an area of law clearly inapplicable in this case—did not
9 offer any other reason why they are entitled to judgement on the pleadings. In their Reply,
10 Defendants responded to Plaintiff’s arguments only by denying that Mr. Klamet and Mr.
11 Kohler acted in their individual capacities. (Dkt. #29, p.2). Once again, the Defendants are
12 correct, but their assertion does not wound the Plaintiff’s claim since this Court has
13 established that under Arizona law, corporate officers may be held personally liable for
14 torts committed in furtherance of company business. Defendants also argued for the first
15 time in their Reply that Plaintiff failed to sufficiently plead its Fraud claim. (Id.) The
16 Court need not consider Defendants’ position, however, since it was first raised in their
17 reply brief. See Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1990) (noting that
18 legal arguments raised for the first time in the reply brief are deemed waived). Thus, even
19 if the argument has merit, this Court cannot appropriately consider it, since Plaintiffs did
20 not have the opportunity to respond. See United States v. Romm, 455 F.3d 990, 997 (9th
21 Cir. 2006). Accordingly, this Court finds that Defendants are not entitled to a judgement
22 on the pleadings.

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III: DEFENDANTS MOTION FOR PERSONAL JURISDICTION

A. Standard

To establish personal jurisdiction, plaintiff has the burden of showing that (1) forum state's long-arm statute confers jurisdiction over the nonresident defendant; and (2) the exercise of jurisdiction comports with principles of due process. Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 269 (9th Cir. 1995). Arizona's long-arm statute confers jurisdiction to the maximum extent allowed by the Due Process Clause of the United States Constitution. ARIZ. R. CIV. P. 4.2(a); Doe v. American Nat'l Red Cross, 112 F.3d 1048, 1050 (9th Cir. 1997). Therefore, the issue before the Court is whether the exercise of jurisdiction over Defendants accords with due process. See Omeluk, 52 F.3d at 269.

Where an evidentiary hearing is not held, dismissal for lack of personal jurisdiction is appropriate only if the plaintiff has not made a *prima facie* showing of personal jurisdiction. Fields v. Sedgwick Associated Risks, Ltd., 796 F.2d 299, 300 (9th Cir. 1986). “[U]ncontroverted allegations in [plaintiff's] complaint must be taken as true, and ‘conflicts between the facts contained in the parties’ affidavits must be resolved in [plaintiff's] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists.’” American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir.1996) (citing WNS, Inc. v. Farrow, 884 F.2d 200, 2003 (5th Cir. 1989). However, a court may not assume the truth of allegations in a pleading that are contradicted by affidavit. Data Disc, Inc., v. Systems Tech. Assoc, 557 F.2d 1280, 1284 (9th Cir. 1977). If the plaintiff is able to meet its prima facie burden, the movant can nevertheless continue to challenge personal jurisdiction either at a pretrial evidentiary hearing or at trial itself. Metropolitan Life Ins. Co. v. Neaves, 912 F.2d 1062, 1064, n.1 (9th Cir. 1990).

1 Due Process requires that the nonresident defendant have “certain minimum
2 contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional
3 notions of fair play and substantial justice.’” International Shoe Co. v. Washington, 326
4 U.S. 310, 316 (1945) (internal citation omitted). There are two types of personal
5 jurisdiction, general and specific. General jurisdiction exists where a non-resident
6 defendant engages in substantial, continuous or systematic activities within the forum.
7 Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 445 (1952). When a defendant’s
8 contacts with the forum do not rise to the level required for general jurisdiction, a court
9 may exercise specific jurisdiction over a claim when it arises from the defendant’s
10 activities within that forum. Shute v. Carnival Cruise Lines, 897 F.2d 377, 897 F.2d 377,
11 381 (9th Cir. 1990) rev’d on other grounds, 499 U.S. 585 (1991).

12 **B. Analysis:**

13 In its complaint, Plaintiff, an Arizona company, alleges that these Individual
14 Defendants made false representations to MNI employees through telephone, email, and
15 mail that caused acts to occur in Maricopa County, Arizona. (Compl., p.2, 3–4). These
16 representations allegedly included multiple promises to make payment that were never
17 kept, as well as assurances that Defendant Improvita had secured or was about to secure
18 new lines of credit that would allow it to make payment. (Compl., 3–4) As a result of
19 these statements, Plaintiff contends Defendants induced it to continue shipping product to
20 Improvita and to forbear from bringing a lawsuit, thereby causing financial injury.
21 (Compl., p. 10). Defendants have not submitted controverting affidavits, thus this Court
22 must accept the uncontested allegations in the complaint as true for the purposes of its
23 analysis. Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1108 (9th Cir. 2002).

24 **1. Fiduciary Shield doctrine**

25 As a threshold issue, this Court must determine if the fiduciary shield doctrine
26 prevents it from exercising jurisdiction over the Defendants. “Under the fiduciary shield
27 doctrine, a person's mere association with a corporation that causes injury in the forum
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1 state is not sufficient in itself to permit that forum to assert jurisdiction over the person.”
2 Davis v. Metro Productions, Inc., 885 F.2d 515, 520 (9th Cir. 1989). In Calder v. Jones,
3 the Supreme court limited the reach of the fiduciary shield doctrine, holding that a
4 defendant’s “status as [an] employee[] does not somehow insulate [her] from jurisdiction.”
5 465 U.S. 783, 790 (1984). Instead, the Supreme Court directed lower courts to access an
6 employee-defendant’s contact with the forum state individually. Id. The Ninth Circuit,
7 applying Calder, has determined that:

8 because the Arizona long-arm statute extends to the limit of constitutional
9 due process and because it is not equitably limited by the fiduciary shield
10 doctrine, the reach of long-arm jurisdiction in Arizona is effectively
11 stretched by the reasoning of Calder. . . . Thus, Arizona’s long-arm statute
may, consistent with constitutional due process, allow assertion of personal
jurisdiction over officers of a corporation as long as the court finds those
officers to have sufficient minimum contacts with Arizona.

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13 Davis, 885 F.2d at 522 (internal citations omitted). Accordingly, the Court finds that
14 Defendants are not protected from personal jurisdiction by their status as corporate
15 employees. Instead, the jurisdictional question will be answered based on “traditional
16 notions of fair play and substantial justice” as embodied in the minimum contacts doctrine.
17 International Shoe, 326 U.S. at 316.

18 2. Minimum Contacts

19 Plaintiff, while not conceding lack of general jurisdiction over individual
20 Defendants, makes its argument for personal jurisdiction based primarily on specific
21 jurisdiction. The Ninth Circuit utilizes a three-prong test to evaluate the nature and quality
22 of Defendants’ contacts for purposes of specific jurisdiction; the test provides:

23 (1) the nonresident defendant must do some act or consummate some
24 transaction with the forum or perform some act by which he purposefully
25 avails himself of the privilege of conducting activities in the forum,
26 thereby invoking the benefits and protections; 2) the claim must be one
which arises out of or results from the defendant’s forum related activities;
and 3) exercise of the jurisdiction must be reasonable.

1 EDIAS Software Intern., LLC v. BASIS Intern. Ltd., 947 F. Supp. 413, 417 (D. Ariz.
2 1996). All three factors must exist for personal jurisdiction to apply. Omeluk v. Langstein
3 Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

4 The first prong of the test—purposeful availment—is “treated . . . somewhat
5 differently in tort and contract cases.” Yahoo! Inc. v. La Ligue Contre Le Racisme Et
6 L'Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006). When confronted with a claim in
7 tort the court must “inquire whether a defendant ‘purposefully directed his activities’ at the
8 forum state, applying an effects test that focuses on the forum in which the defendants’
9 actions were felt.” Id. To satisfy the effects test, a defendant must have: “(1) committed
10 an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the
11 defendant knows is likely to be suffered in the forum state.” Id. Under this test, a
12 defendant need not have had physical contact with the forum state for a court to exercise
13 its jurisdiction. Brainerd v. Governors of the University of Alberta, 873 F.2d 1257, 1260
14 (9th Cir. 1989).

15 For its *prima facie* showing of personal jurisdiction, Plaintiff relies exclusively on
16 the allegations set forth in its complaint. Therein, Plaintiff asserts two tort claims against
17 Defendants; Fraud and Negligent Misrepresentation. The former is an intentional tort
18 claim, while the latter is not. Plaintiff contends that the effects test is applicable to both
19 causes of action. This is incorrect: “It is well established that the [effects] test applies only
20 to intentional torts, not to . . . breach of contract and negligence claims.” Holland America
21 Line Inc. v. Wartsila North America, Inc., 485 F.3d 450, 460 (9th Cir. 2007).

22 Accordingly, the Court will analyze Plaintiff’s fraud claim under the purposeful-direction
23 effects test, and its negligent misrepresentation claim under the purposeful availment
24 standard.

25 **a. Purposeful Direction**

26 The first prong of the effects test requires the Court to find that Defendants
27 committed an intentional act. “‘Intent’ in the context of the ‘intentional act’ test refer[s] to
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1 an intent to perform an actual physical act in the real world, rather than an intent to
2 accomplish a result or consequence of that act.” Schwarzenegger v. Fred Martin Motor
3 Co., 374 F.3d 797, 806 (9th Cir. 2004). And, an “‘act’ denotes an external manifestation
4 of the actor’s will.” Id. (quoting The Restatement (Second) of Torts § 2 (1964)). The
5 phone calls, emails, and mailings sent by the Defendants and the misrepresentations
6 therein constitute intentional acts for the purposes of the effects test. The acts alleged in
7 the Plaintiff’s complaint cannot occur spontaneously or because of reflex, thus Defendants
8 must have intended to perform them. And it goes almost without saying that Defendants’
9 intent to perform them clearly manifested itself externally. Accordingly, this Court has no
10 trouble finding that the intentional act prong of the effects test has been met. See Calder,
11 465 U.S. at 789 (finding the researching, writing, editing, and publishing of an allegedly
12 libelous article is an intentional act); Schwarzenegger, 374 F.3d at 806 (holding that
13 placing an add in a local newspaper constituted an intentional act); Bancroft & Masters,
14 Inc. v. Augusta Nat’l, Inc., 223 F.3d 1082, 1088 (9th Cir.2000) (finding that the sending of
15 a demand letter constituted an intentional act).

16 Next, the court must consider whether the Defendants expressly aimed their
17 intentional acts at Arizona. The “express aiming” requirement is met when “the defendant
18 is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant
19 knows to be a resident of the forum state.” Bancroft & Masters, 223 F.3d at 1087. Acts
20 that have merely foreseeable effects in the forum state are insufficient. Id. In the instant
21 case, Defendants must surely have known that the consequences of their allegedly
22 wrongful conduct would be felt in Arizona. After all, the Defendants made each and
23 everyone of their alleged misrepresentations directly to Plaintiff, an Arizona corporation.
24 These actions constitute the type of “individual targeting” that is the gravamen of the
25 expressly-aiming test. See, e.g., Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1112 (9th
26 Cir. 2002) (“Because Watts and Boenneken knew that Dole’s principal place of business
27 was in California, knew that the decisionmakers for Dole were located in California, and
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1 communicated directly with those California decisionmakers, we conclude that their
2 actions were “expressly aimed” at the forum state.”); Bancroft & Masters, 223 F.3d at
3 1087 (finding that a demand letter sent to Virginia was expressly aimed at California
4 because it targeted a California corporation).

5 Finally, the Court must determine if the Defendants caused harm that they knew
6 was likely to be suffered in the forum state “[W]hen a forum in which a plaintiff
7 corporation has its principal place of business is in the same forum toward which
8 defendants expressly aim their acts, the “effects” test permits that forum to exercise
9 personal jurisdiction”. Dole, 303 F.3d at 1114. In other words, when the Plaintiff’s
10 principal place of business is located in the same forum at which the defendant aimed her
11 intentional acts, the Court may find that a defendant knew harm was likely to be suffered
12 in the forum state. See Id. Such is the situation at hand. This Court has already decided
13 that Defendant aimed its actions at Arizona and that Plaintiff’s principal place of business
14 is Arizona. This being the case, all that is left for the Court to decide is if Plaintiff has
15 alleged harm. In its pleadings, Plaintiff claims that Defendants’ misrepresentations
16 caused it both to continue shipping product to Imporvita and to forbear from bringing a
17 lawsuit, and that these decisions caused it economic injury. (Cmplnt., p.4). The Court,
18 therefore, believes that the causing-harm prong of the effects test has been met.
19 Consequently, the Court also finds that Defendants purposefully directed their alleged
20 fraudulent conduct at Arizona, satisfying the first prong of the minimum-contacts test.

21 **b. Purposeful Availment:**

22 Before moving onto the second and third elements of the minimum contacts test,
23 the Court will consider whether the purposeful availment element has been satisfied with
24 respect to Plaintiff’s negligent-misrepresentation allegation. Defendants argue that their
25 contacts with Arizona are limited to communications via US Mail, email, and phone calls,
26 and that these actions are insufficient to find purposeful availment. (Dkt. #29, p.4).
27 Plaintiff, arguing for an application of the effects test, did not directly address this issue.
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1 The purposeful availment standard is meant to determine whether “the defendant's
2 conduct and connection with the forum State are such that he should reasonably anticipate
3 being haled into court there.” World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297
4 (1980). And, it “is based on the presumption that it is reasonable to require a defendant
5 who conducts business and benefits from his activities in a state to be subject to the burden
6 of litigating in that state as well.” Brainerd v. Governors of the University of Alberta, 873
7 F.2d 1257, 1259 (9th Cir.,1989). “Jurisdiction may not be avoided by a lack of physical
8 contact with the forum state.” Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987).
9 “Nevertheless, a defendant may not be haled into a jurisdiction as the result of random,
10 fortuitous or attenuated contacts or based upon the unilateral acts of third parties.” Id.

11 Plaintiff’s negligent misrepresentation suit is brought against Messrs. Kohler and
12 Klamet in their corporate capacity as officers of Defendant Improvita. As such, the
13 Defendants’ contacts with Arizona cannot reasonably be said to have been for their
14 benefit, instead they were for the benefit of their employer. Similarly, this Court cannot
15 find that these Defendants have conducted business in Arizona, only that their employer
16 has. Accordingly, it is difficult for this Court to conclude that they have enjoyed the
17 benefits of or invoked the protection of Arizona’s laws. Additionally, and in light of the
18 Defendants lack of business contacts with Arizona, the Court has concerns about the
19 sufficiency of Defendants’ contacts with Arizona. See e.g. Scullin Steel Co. v. National
20 Ry. Utilization Corp., 676 F.2d 309, 314 (8th Cir. 1982) (“The use of interstate facilities
21 (telephone, the mail) . . . are secondary or ancillary factors and cannot alone provide the
22 “minimum contacts” required by due process.”); see also Brainerd, 873 F.2d at 729
23 (declining to find purposeful availment test met where alleged contacts consisted of
24 communications between individuals at two universities, and the defendant did not
25 otherwise conduct business in the proposed forum state). In sum, the Court does not
26 believe these Defendants’ contacts with Arizona were such they should reasonably have
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1 anticipated being brought to court there. Accordingly, this court must decline to exercise
2 its jurisdiction over Defendants on Plaintiff's negligent misrepresentation claim.

3 Before moving on, the Court acknowledges that at first blush it seems illogical that
4 personal jurisdiction could potentially be exercised over these Defendants on one claim,
5 but not the other. After all, both claims stem from the same set of facts and allege the
6 same contacts with Arizona. The different tests that the Court must apply to each claim,
7 however, dictate such a result. See, e.g., See Brainerd, 873 F.2d at 729 (finding that
8 defendant's contacts did not satisfy the purposeful availment test, but did satisfy the
9 purposeful direction test). In finding that Defendants satisfied the purposeful direction
10 test, the Court focused on whether defendants knew or should have known their intentional
11 acts would have an effect in Arizona. In making this determination, the Court did not have
12 to wrestle with many of the considerations that are essential elements of purposeful
13 availment, such as whether Defendants conducted business with Arizona or personally
14 benefitted from such activities. Had it been required to do, the Court's determination may
15 well have been different.

16 **c. Arising Out of the Forum Related Activities:**

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18 Having determined that Plaintiff's fraud claim satisfied the first prong of the
19 minimum contacts test, the Court must "rely on a "but for" test to determine whether a
20 particular claim arises out of forum-related activities and thereby satisfies the second
21 requirement for specific jurisdiction." Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir.
22 1995). The question, therefore, is: but for the Individual Defendants' contacts with the
23 Plaintiff, would the Plaintiff's claims have arisen? Plaintiff answers this question in the
24 affirmative, arguing that had Defendants not made fraudulent representations, it would not
25 have suffered the economic harm alleged in its complaint. (Dkt. #28, p.9). The Court
26 agrees with this logic. Taking, as it must, the Plaintiff's allegations as true, it is reasonable
27 to assume that Plaintiff would not have continued to ship product to a company that had
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1 not paid it for previous shipments, except for the assurances of payment and ability to pay
2 made to it be the Defendants. The Plaintiff has carried its burden on this element.

3 **d. Reasonableness**

4 Finally, the Court needs to determine if exercising personal jurisdiction over the
5 Defendants is reasonable. The Court must “presume that an otherwise valid exercise of
6 specific jurisdiction is reasonable.” Ballard, 65 F.3d at 1500. To avoid jurisdiction,
7 Defendants “must present a compelling case that the presence of some other
8 considerations would render jurisdiction unreasonable.” Id. (quoting Burger King Corp.
9 v. Rudzewicz, 471 U.S. 462, 477 (1985)). In determining reasonableness, the Court must
10 consider:

11 (1) the extent of the defendants' purposeful injection into the forum state's
12 affairs; (2) the burden on the defendant of defending in the forum; (3) the
13 extent of conflict with the sovereignty of the defendant's state; (4) the forum
14 state's interest in adjudicating the dispute; (5) the most efficient judicial
15 resolution of the controversy; (6) the importance of the forum to the
16 plaintiff's interest in convenient and effective relief; and (7) the existence of
17 an alternative forum

18 Dole, 303 F.3d at 1114. Finally, the court must balance and weigh all seven factors; none
19 is dispositive. Ziegler v. Indian River County, 64 F.3d 470, 475 (9th Cir 1995).

20 **1. Purposeful Injection:**

21 The first element of the reasonableness prong of the minimum contacts test is
22 purposeful injection. The Court has already concluded Defendants purposely directed
23 their actions at Arizona. This finding, however, does not necessitate a determination that
24 the purposeful injection elements satisfied. “There may be circumstances under which the
25 level of purposeful injection into the forum supports a finding of purposeful availment [or
26 purposeful direction] yet still weighs against the reasonableness of jurisdiction.” Dole,
27 303 F.3d at 1104. The Defendants—conflating the purposeful injection with the
28 purposeful availment test—urge that they did not personally conduct any business in
Arizona and have only been accused of sending emails and mail, and making phone calls;

1 actions they argue are insufficient to meet the purposeful availment test (or, presumably,
2 the purposeful injection test). (Dkt. #29, p. 4). Were they accused merely of making
3 phone calls and sending email, the purposeful injection prong would likely weigh in their
4 favor. The problem with the Defendants' argument is that it separates the communications
5 from their content. The communications are alleged to have conveyed fraudulent
6 statements that caused Plaintiff, an Arizona corporation, to take actions which the
7 Defendants must surely have known would cause it harm. By so doing, the Defendants
8 purposefully injected themselves into this forum. See e.g. Id. at 1114 (finding purposeful
9 injection where "[n]ot only did [defendants] know that their scheme would injure Dole
10 U.S., which they knew had its principal place of business in California, but they also
11 engaged in repeated communications with Dole managers in California in furtherance of
12 their alleged scheme."). For these reasons, the Court finds that the purposeful injection
13 factor weighs in favor of the Plaintiff.

14 **2. The Burden of Defending in the Forum**

15 The next factor the Court must consider is the burden on Defendants of defending
16 in the forum. Defendants, residents of Ohio, claim that forcing them to defend this matter
17 in Arizona would place on them a substantial burden. In support of this contention,
18 Defendants inform the Court that they are "individual entrepreneurs", and that traveling to
19 Arizona, even for one day, would "seriously affect their ability to earn a livelihood." (Dkt.
20 #29, p.5). "[U]nless the inconvenience [to the defendants of litigating in the forum state]
21 is so great as to constitute a deprivation of due process, it will not overcome clear
22 justifications for the exercise of jurisdiction." Panavision Intern., L.P. v. Toeppen, 141
23 F.3d 1316, 1323 (9th Cir. 1998) (internal quotation omitted). The Court is sympathetic to
24 the Defendants' arguments, but notes that "modern advances in communications and
25 transportation have significantly reduced the burden of litigating" in another forum.
26 Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1199 (9th Cir.1988). Taking the
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Defendants at their word, the Court finds that this factor weighs against exercising its jurisdiction, but only slightly.

3. Conflict with the Sovereignty of Ohio

The Court must also consider the extent to which its exercise of jurisdiction in Arizona would conflict with the sovereignty of Ohio. Defendants argue that such a conflict exists because the legal theory on which the Plaintiff rests its case is not recognized in Ohio. (Dkt. #26). This Court, respectfully disagrees with the Defendants' conclusions. Just like in Arizona, Ohio recognizes that "[w]hen a corporate officer commits a tort while in the performance of his duties, he is individually liable for the wrongful act." See, e.g., Shaffer v. Frontrunner, Inc., 566 N.E.2d 193, 197 (Ohio App., 1990). This factor, therefore, presents no barrier to litigation in this case.

4. Forum State's Interest

The fourth factor that this Court must examine concerns Arizona’s interest in having this case litigated in state. Plaintiffs argue that Arizona has a strong public-policy interest in preventing foreigners from committing torts against its citizens. (Dkt. #28, p.11). Defendant, on the other hand, denies that Arizona has any such interest, and, to the contrary asserts that should this claim be allowed to proceed, “the costs to the Arizona Court system conducting this trial will be thousands of dollars concerns out-of-state residents.” (Dkt. # 29, p.5–6). The Court begins by noting that states have a strong incentive in providing their citizens with an effective means of redress from tort. See Sinatra, 654 F.2d at 1200. Second, the Court does not understand, nor have Defendants explained, how trying a case in federal court will cost the Arizona court system one cent, let alone thousands of dollars. For these reasons, the “forum state’s interest” test weighs in favor of the Plaintiff.

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1 proper. The burden of rebutting the presumption of reasonableness lay with the
2 Defendants; it was not met. Id. Therefore, this Court finds that Plaintiff has made the
3 necessary *prima facie* showing of jurisdictional fact with respect to its fraud claim. The
4 Court cannot exercise jurisdiction over Plaintiff's negligent misrepresentation claim, as the
5 facts plead do not permit a finding that the first element of the minimum contacts
6 test—purposeful availment—has been satisfied.

7 However, “[w]hen a defendant must appear in a forum to defend against one claim,
8 it is often reasonable to compel that defendant to answer other claims in the same suit
9 arising out of a common nucleus of operative facts.” Action Embroidery Corp. v. Atlantic
10 Embroidery, Inc., 368 F.3d 1174, 1181 (9th Cir. 2004). Under the doctrine of pendent
11 personal jurisdiction the court may exercise its jurisdiction “over a defendant with respect
12 to a claim for which there is no independent basis of personal jurisdiction so long as it
13 arises out of a common nucleus of operative facts with a claim in the same suit over which
14 the court does have personal jurisdiction.” Id. at 1180. Such a decision is completely
15 within the Court's discretion and should be made to promote “judicial economy, avoidance
16 of piecemeal litigation, and overall convenience.” Id. at 1181. Plaintiff's negligent
17 misrepresentation claim against Defendants, over which this Court does not have
18 jurisdiction, clearly arises from the same set of operative facts. Consequently, the Court
19 finds that exercising its jurisdiction over both of Plaintiff's claims against these
20 Defendants would promote the interests of justice and the efficient use of the parties' and
21 the Court's resources.

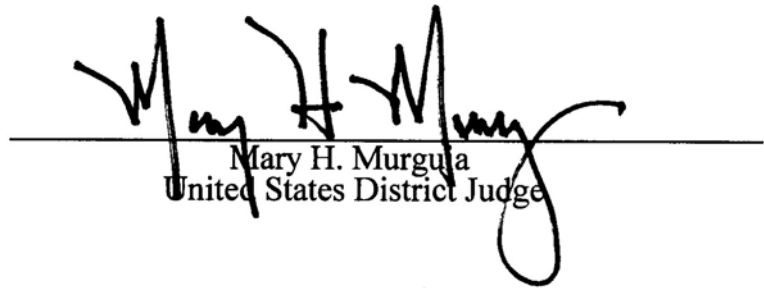
22 **Accordingly,**

23 **IT IS HEREBY ORDERED** that Defendants Thomas Klamet and Daniel Kohler's
24 Motion for Judgement on the Pleadings, (Dkt. #26), is DENIED

25 **IT IS FURTHER ORDERED** that Defendants request to Dismiss Plaintiff's
26 claims for lack of personal jurisdiction, (Dkt. #26), is DENIED as to Plaintiff's
27 fraud claim and GRANTED as to Plaintiff's negligent misrepresentation claim.
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1 **IT IS FURTHER ORDERED** that Plaintiff's claim for negligent
2 misrepresentation will remain part of this case under the Court's discretionary
3 application of pendent personal jurisdiction

4 DATED this 29th day of September, 2009.
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9 Mary H. Murgula
10 United States District Judge
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